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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of CONRADO and
TERESITA OROPEZA.

CONRADO OROPEZA,

Appellant,

v.

ALFREDO L. CASILLAS, as Executor
etc.,

Respondent.

D041966

(Super. Ct. No. 81636)

APPEAL from a judgment of the Superior Court of Imperial County, Raymond A.
Cota, Judge. Affirmed.

Conrado Oropeza filed this action to dissolve his marriage of 21 years to Teresita
Oropeza.¹ Conrado appeals an order denying his motion under Family Code² section

¹ For purposes of clarity, we refer to the former spouses by their first names and intend no disrespect.

2120 et seq. to set aside the judgment of dissolution on reserved issues entered in accord with the former spouses' written stipulation for judgment. Conrado contends the court abused its discretion by not setting aside the judgment on the grounds of unilateral mistake (§ 2122, subd. (e)) or failure to comply with statutory disclosure requirements for entry of judgment (§§ 2103-2106, 2122, subd. (f)). We determine Conrado has not shown any mistake or prejudicial statutory noncompliance warranting setting aside the judgment and, accordingly, affirm the order denying his set-aside motion.

I

FACTUAL AND PROCEDURAL BACKGROUND

For purposes of determining the propriety of the order denying Conrado's motion to set aside the judgment, we state the evidence and reasonable inferences most favorably to Teresita's executor Casillas as the prevailing party in the trial court. (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 597-598.)

Conrado and Teresita married in February 1973, and separated in March 1994. The spouses were actively involved in several businesses they owned (the Business). In June 1994 Conrado petitioned to dissolve the marriage, and Teresita moved from El Centro to San Diego seek a college degree and gain marketable skills. Teresa gave

In January 2002 Teresita died. In September 2002 upon Conrado's motion, the court joined Alfredo L. Casillas (Teresita's brother and the executor of her estate) in the set-aside proceedings. Casillas is the respondent in this appeal.

² Unless otherwise specified, all further statutory references are to the Family Code in effect at the time the marital dissolution judgment was entered in 2002.

Conrado power over all management, decisionmaking and activities of the Business. Conrado began maintaining sole control of the operations and condition of various community assets.

In 1996 Teresita returned to El Centro. Teresita retained Attorney Kathlene J. Somerville to review documents provided by Conrado about the operations and condition of the Business over which he had retained sole control since June 1994, and to draft a marital settlement agreement. The documents indicated the Business might be in financial distress because of unpaid taxes and investments made by Conrado without Teresita's knowledge or consent. In October 1996 the spouses signed a stipulation and agreement (1996 Agreement) that provided Teresita would commence active management of the Business, both spouses would be responsible for the Business's day-to-day operations, and Teresita would have primary responsibility for the Business's financial aspects. Conrado agreed to reimburse the Business or the community for all Business funds he took for personal use or for other than Business or community purposes. In November 1996 upon the spouses' request, the court entered an order incorporating the 1996 Agreement.

Subsequently, Teresita became terminally ill. By November 1999 Teresita's illness rendered her unable to remain "significantly involved" in the Business and prevented her from having any substantial contact with the Business. Conrado took over management and control of the Business.

In December 1999 the court dissolved the spouses' marital status and reserved jurisdiction over other issues, including support and disposition of community property.

In June 2001 the former spouses executed a stipulation for judgment on reserved issues (2001 Stipulation) drafted by Attorney Somerville on Teresita's behalf. The 2001 Stipulation addressed disposition of property issues and provided Conrado would make a \$178,633.34 equalization payment to Teresita over five years. The 2001 Stipulation incorporated the former spouses' signed waiver of the statutory requirement for exchange of final declarations of disclosure. Concurrently with executing the 2001 Stipulation, Teresita made an interspousal transfer of the Business to Conrado, including the Business's personal property, assets and debts. The 2001 Stipulation was entered into because of Teresita's health challenges and was intended to be given full force and effect regardless of the disposition of the former spouses' chapter 13 bankruptcy proceedings.³

On January 20, 2002, Teresita died.

On February 4, 2002, the court entered judgment on reserved issues in accord with the 2001 Stipulation.

II

CHALLENGED FAMILY COURT PROCEEDINGS

In July 2002 Conrado moved to set aside the judgment on the ground its calculated property valuation was incorrect based on "fraud" or "mistake."⁴ (§ 2122.) In the alternative, Conrado sought set aside of the equalization payment set forth in the

³ Apparently, the automatic stay provision of the Bankruptcy Code precluded the family court from then entering the judgment of dissolution on reserved issues. (11 U.S.C. § 362(a)(1), (d).)

⁴ On appeal, Conrado has not pursued his fraud theory.

judgment and the underlying 2001 Stipulation. Conrado asserted that at the time he signed the 2001 Stipulation he believed the former spouses' community estate had a value higher than its actual worth because (1) Teresita misappropriated almost \$350,000 from the Business between 1996 and 2002 for personal use without disclosure to Conrado; and (2) Teresita, as the Business's responsible officer, had not paid some employment taxes for which Conrado was now responsible. Conrado proceeded on the theory that Teresita's purported nondisclosed misappropriation and tax nonpayment resulted in his unilateral mistaken belief that the community estate had a value higher than its actual worth, and that had he known of Teresita's misappropriation and failure to pay taxes, he would not have agreed to the \$178,633.34 equalization payment.

In March 2003 after hearing, the trial court denied Conrado's motion to set aside the judgment. The court did not render a written statement of decision, and none was requested. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134 (*Arceneaux*).)

III

DISCUSSION

Conrado contends the trial court should have set aside the judgment on the grounds of his unilateral mistake (§ 2122, subd. (e)) and the former spouses' noncompliance with statutory disclosure requirements (§§ 2103-2106, 2212, subd. (f)).

"We review the trial court's decision in ruling on the motion to set aside the judgment . . . to determine if the trial court abused its discretion." (*In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1346 (*Brewer*).) Conrado as appellant

has the burden to establish an abuse of discretion has occurred. (Cf. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "[T]he showing on appeal is wholly insufficient if it presents a state of facts . . . which . . . merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138 (*Varner*).)

"In a nonjury trial the appellant preserves the record by requesting and obtaining from the trial court a statement of decision pursuant to California Code of Civil Procedure section 632. The statement of decision provides the trial court's reasoning on disputed issues and is our touchstone to determine whether or not the trial court's decision is supported by the facts and the law." (*Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718 (*Slavin*), citing *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647 (*Ditto*).) Where, as here, the parties have "*waived* a statement of decision (by express consent or by failure to timely or properly request it . . .), appellate courts review the appealed judgment or order under the doctrine of 'implied findings': i.e., it is *presumed* on appeal that the trial court made all factual findings necessary to support the judgment for which there is substantial evidence; all intendments are indulged in favor of the judgment or order, and appellate review is limited to searching the record for any substantial evidence that will support the lower court's 'implied findings.'" (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2004) ¶ 16:215, pp. 16-63 to 16-64, citing *Arceneaux, supra*, 51 Cal.3d at pp. 1133-1134; accord, *In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 928 (*Cohn*); *Slavin*, at p. 718; *Ditto*, at p. 647.)

Conrado characterizes this appeal as involving numerous legal errors by the trial court. However, resolution of this appeal essentially depends on whether substantial evidence supported the court's express and implied findings. (*Arceneaux, supra*, 51 Cal.3d at pp. 1133-1134; *Cohn, supra*, 65 Cal.App.4th at p. 928; *Slavin, supra*, 25 Cal.App.4th at p. 718; *Ditto, supra*, 206 Cal.App.3d at p. 647.) As we shall explain, the court acted within its discretion in denying Conrado's set-aside motion.

A

Circumstances Surrounding Entry of Judgment

Preliminarily, we note Conrado's appellate briefs assert that Teresita represented herself in propria persona throughout the dissolution proceedings. Indeed, the first page of the judgment stated Teresita was in propria persona. Conrado's briefs also assert the judgment was submitted to the court for filing by someone other than Teresita without her authorization. Elsewhere, Conrado's briefs assert that without filing a substitution of attorney indicating she was Teresita's attorney of record, Attorney Somerville delivered the proposed judgment on reserved issues (with the 2001 Stipulation attached) to the superior court for filing after Teresita's death without authority to do so. However, Conrado's briefs do not claim any reversible judicial error related to the circumstances surrounding the submission of the proposed judgment to the court for filing. Further, as acknowledged by counsel at oral argument, in the trial court Conrado did not assert error with respect to those circumstances.

Nevertheless, at oral argument Conrado contended the judgment was void because it was submitted for filing after Teresita's death by Attorney Somerville without

authorization. However, even if Conrado's contention were not barred as raised for the first time on appeal, we would reject it. In support of that contention, Conrado as appellant would have the burden to show when the judgment was submitted to the court for filing, who submitted the judgment and that person's lack of authority to do so, a burden not met by Conrado.

Conrado has not demonstrated anything in the evidentiary record supporting his contention. Teresita died on January 20, 2002; the court signed the proposed judgment on February 1, 2002; and the judgment was entered on February 4, 2002. Conrado has not identified any evidence showing whether the proposed judgment was submitted to the family law clerk for processing before or after Teresita's death. Considering the heavy calendars of the family court and the volume of documents submitted to the family law clerk for processing, Conrado's contention the proposed judgment was submitted after Teresita's death is speculation. Further, although at oral argument the parties' attorneys indicated they believed Attorney Somerville submitted the proposed judgment to the court for filing, Conrado has not identified any evidence showing Attorney Somerville actually did so. Consistent with the first page of the document indicating Teresita was in propria persona, we accept as fact that Attorney Somerville was not attorney of record in the dissolution proceedings. However, that fact would not necessarily mean Attorney Somerville lacked authority to submit the proposed judgment to the clerk for filing. Contrary to Conrado's theory, nothing on the face of the proposed judgment indicated the judgment was void because its submission was unauthorized whether made by Attorney

Somerville or anyone else. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441; *Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1194.)

In any event, regardless when the proposed judgment was submitted to the court, Teresita died before the court signed and entered the proposed judgment. Because the former spouses' marital status had already been dissolved, the family court retained jurisdiction to decide property issues after Teresita's death. (*In re Marriage of Hilke* (1992) 4 Cal.4th 215, 220; *McClenny v. Superior Court* (1964) 62 Cal.2d 140, 144; *Estate of Mitchell* (1999) 76 Cal.App.4th 1378, 1386; *In re Marriage of Allen* (1992) 8 Cal.App.4th 1225, 1229; *Kinsler v. Superior Court* (1981) 121 Cal.App.3d 808, 812.) As was proper, Teresita's executor was eventually substituted into the action in place of Teresita. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1151; *Allen*, at p. 1229; *Kinsler*, at p. 812.)

The 2001 Stipulation provided that "[e]ither party, without further notice to the other," could obtain a supplemental or final judgment of dissolution as permitted by the court. The 2001 Stipulation also provided it would "inure to the benefit of and be binding on each party and the heirs, personal representatives, assigns and other successors-in-interest of each party." Hence, as Teresita's personal representative, Casillas had the contractual authority to protect the judgment by defending against Conrado's set-aside motion. As Teresita's personal representative, Casillas also had statutory authority to substitute into this litigation and defend against Conrado's motion to set aside the judgment. (Prob. Code, § 9820.) In April 2002 Casillas petitioned to administer Teresita's estate. In July 2002 Conrado filed his motion to set aside the judgment. In

September 2002 the court granted Conrado's motion to join Casillas in the set-aside proceedings. In January 2003, consistent with his authority, Casillas filed opposition to Conrado's set-aside motion. Casillas's actions in attempting to protect the judgment against Conrado's motion essentially ratified the submission of the proposed judgment to the court for its February 2002 entry whether done with or without authorization by Attorney Somerville or someone else. (Civ. Code, § 2307; *Kadota Fig Assn. v. Case-Swayne Co.* (1946) 73 Cal.App.2d 815, 821; *Boteler v. Conway* (1936) 13 Cal.App.2d 79, 83; 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency & Employment, § 87, p. 88.)

B

Conrado Did Not Demonstrate a "Unilateral Mistake" Warranting Set Aside of Judgment

Preliminarily, Conrado contends the trial court erred by analyzing his set-aside motion under the jurisprudence of Code of Civil Procedure section 473 instead of applying the assertedly exclusive statutory scheme commencing at Family Code section 2120. However, where, as here, the set-aside motion is brought within the first six months after entry of judgment, Code of Civil Procedure section 473 and the Family Code statutory scheme "coexist." (*In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 32-33.) As a corollary, Conrado contends the court erred by analyzing his set-aside motion under the law of mistake set forth in the Civil Code and used in traditional set aside motions under Code of Civil Procedure section 473 instead of applying the broader

definition of mistake set forth in the Family Code statutory scheme.⁵ The crux of Conrado's argument is that Family Code section 2122, subdivision (e) allows the set aside of a stipulated judgment for *unilateral mistake* without a showing of fault. (*Brewer, supra*, 93 Cal.App.4th 1334; *Varner, supra*, 55 Cal.App.4th 128; Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 16:122, p. 16-32.) Because Conrado raised the Family Code statutory scheme in his set-aside motion papers, we shall analyze the motion under that scheme, including Family Code section 2122, subdivision (e)'s definition of mistake. Nevertheless, even under that broader definition of mistake, Conrado as the party asserting unilateral mistake under Family Code section 2122, subdivision (e) was required to show he was operating under a mistake of fact at the time he executed the 2001 Stipulation.

At the hearing on Conrado's motion to set aside the judgment, the trial court stated it found no obvious "finagling" or "abuse of fiduciary duty" by Teresita. The court impliedly found Teresita did not misappropriate community assets or fail to pay taxes. Based upon the nonexistence of any misappropriation or tax nonpayment by Teresita, the court also impliedly found Conrado did not show he had any unilateral mistake that resulted in actual overvaluation of the community estate at the time he signed the 2001 Stipulation. (§ 2122, subd. (e).) Attacking those express and implied findings, Conrado contends the court should have set aside the equalization payment portion of the

⁵ Among the grounds for setting aside a stipulated judgment is "mistake, either mutual or unilateral, whether mistake of law or mistake of fact." (§ 2122, subd. (e).)

judgment and the underlying 2001 Stipulation for mistake. (*Ibid.*) However, because the evidentiary record supported the court's express and implied findings, on appeal Conrado has not demonstrated any judicial error.

As discussed, Conrado alleged that at the time he signed the 2001 Stipulation and agreed to the disputed equalization payment of \$178,633.34, he thought the community estate was worth more than it actually was because Teresita had misappropriated funds from the Business and failed to pay taxes for which he was now responsible.

Conrado contends he presented undisputed evidence to the family court establishing his "unilateral mistake" in overvaluing the community assets. Conrado contends the evidence submitted by Casillas was incompetent because Casillas and Attorney Somerville had no personal knowledge about the alleged misappropriation or failure to pay taxes, and Teresita, the only other individual with knowledge of the events, had died.⁶

Conrado's declarations asserted that beginning in 1996 Teresita misappropriated community funds from the Business and failed to pay taxes; Conrado did not discover Teresita's misappropriation or tax nonpayment until he took over the Business's books and records after her death; Conrado did not have access to the books and records earlier because Teresita did not disclose them; and Conrado would not have agreed to the equalization payment had he known of Teresita's misappropriation and tax nonpayment.

⁶ Although Conrado argues Casillas's evidence was not persuasive, he has not contended the evidence was erroneously admitted.

Conrado also asserted that even after Teresita's illness worsened in 1999, she continued to take significant sums from the Business for personal use. Conrado thus concludes he demonstrated a unilateral mistake for purposes of setting aside the equalization payment portion of the judgment and the underlying 2001 Stipulation. (§ 2122, subd. (e).)

However, the mere fact that Conrado submitted evidence did not render the evidence admissible. (*Lohman v. Lohman* (1946) 29 Cal.2d 144, 149 (*Lohman*) ["a trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it, and this rule applies to an affidavit"].)

To prove his unilateral mistake in overvaluing the community estate resulted from Teresita's alleged nondisclosed misappropriation of community assets and nonpayment of taxes, Conrado attached to his declaration various unauthenticated records purportedly showing that Teresita had improperly taken almost \$350,000 from the Business for personal use and failed to pay some Business taxes. However, Casillas objected to the records on foundational grounds. The objection was well taken because Conrado did not show who prepared the records, how the records were prepared, the purpose for preparing the records or how the underlying data were compiled. "A document is not presumed to be what it purports to be, and it must be authenticated in some fashion before it is introduced into evidence." (*Fakhoury v. Magner* (1972) 25 Cal.App.3d 58, 65; Evid. Code, § 1400; see *Continental Baking Co v. Katz* (1968) 68 Cal.2d 512, 525.) In denying Conrado's set-aside motion, the trial court impliedly rejected the records attached to Conrado's declaration as unauthenticated and inadmissible.

The family court also impliedly disbelieved Conrado. The issue of Conrado's credibility was a determination for the court. (*Lohman, supra*, 29 Cal.2d at p. 149.) Conrado's credibility was severely diminished by substantial evidence that Conrad, not Teresita, was in control of the Business during times when Teresita allegedly misappropriated its funds and incurred tax delinquencies. Conrado stated in the 2001 Stipulation under penalty of perjury that Teresita had not been "significantly involved" in the Business since at least November 1999, and that he had taken over management and control of the Business at that time. The facts recited by Conrado in the 2001 Stipulation were conclusively presumed to be true as between the former spouses (Evid. Code, § 622).⁷ Additionally, Casillas presented evidence that beginning in November 1999 Teresita's illness prevented her from having any substantial contact with the Business. Indeed, Conrado concedes the evidence conflicted on whether after November 1999 Teresita was in sole charge of the Business's finances. The trial court impliedly resolved that evidentiary conflict in favor of Casillas.

The trial court also impliedly found that at the time the 2001 Stipulation was executed, Conrado was aware that debts and delinquent tax liabilities existed against the Business because allocation of those debts and liabilities had been the subject of considerable negotiation between the former spouses. The court's implied finding was

⁷ At oral argument Conrado asserted Teresita signed two checks totaling \$822.36. However, Conrado has not shown such conduct by Teresita constituted significant involvement in the business. Moreover, copies of those checks were among the records attached to Conrado's declaration rejected by the court as unauthenticated and inadmissible.

supported by evidence presented by Casillas and by Conrado's admission in the 2001 Stipulation that he alone was responsible for outstanding debts of the Business, including delinquent tax liabilities that until November 1, 1999, had not existed or had not yet been perfected. (Evid. Code, § 622.) Further, because Conrado had been running the Business after November 1999, he was in a "superior position" to obtain the financial records and information from which the Business could be valued. (*Brewer, supra*, 93 Cal.App.4th at p. 1348; *In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673 (*Rosevear*).) Indeed, evidence indicated tax problems arose during Conrado's sole stewardship of the Business. Thus, the record contained substantial evidence supporting the trial court's implied findings that Teresita did not misappropriate community assets or fail to pay Business taxes.

Case law reveals circumstances where presentation of admissible credible evidence, including expert testimony, demonstrates the existence of a spouse's actual unilateral mistake in the valuation of the community estate based upon the existence of an undisclosed asset or the undervaluation of community assets because the spouse with superior knowledge or access to records failed to provide necessary financial information. (E.g., *Brewer, supra*, 93 Cal.App.4th at p. 1348; *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1150-1151.) However, here, Conrado has failed to establish the existence of any mistake in the valuation of the former spouses' community estate resulting from Teresita's misappropriation or tax nonpayment. Indeed, Conrado presented no evidence that the actual value of the community estate was other than the valuation used by the parties in entering into the 2001 Stipulation.

This evidentiary record supported the trial court's express and implied findings that when Conrado entered the 2001 Stipulation underlying the judgment, he did not have an actionable "unilateral mistake," the factual predicate for relief under section 2122, subdivision (e). (§ 2121, subd. (b) ["In all proceedings under this chapter, before granting relief, the court shall find that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief"].) Accordingly, considering the absence of a showing that Conrado's alleged unilateral mistake materially affected the equalization payment portions of the 2001 Stipulation or the judgment, the trial court properly declined to set aside the judgment on the ground of mistake. (*Arceneaux, supra*, 51 Cal.3d at pp. 1133-1134; *Lohman, supra*, 29 Cal.2d at p. 149; *Cohn, supra*, 65 Cal.App.4th at p. 928; *Slavin, supra*, 25 Cal.App.4th at p. 718; *Ditto, supra*, 206 Cal.App.3d at p. 647.)

C

Failure to File Disclosure Documents Did Not Warrant Set Aside of the Judgment

Among the grounds for setting aside a marital dissolution judgment is "[f]ailure to comply with the disclosure requirements of Chapter 9 (commencing with Section 2100). . . ." (§ 2122, subd. (f).) At the hearing on Conrado's motion to set aside the judgment, the trial court found Conrado did not present evidence sufficient to warrant setting aside the judgment because of lack of disclosure. The court expressly found no

"abuse of fiduciary duty" by Teresita. (§ 2102.)⁸ Attacking those findings, Conrado contends the court should have set aside the equalization portion of the judgment and the underlying 2001 Stipulation because the former spouses failed to comply with the statutory disclosure requirements contained in section 2103 and sections 2105 through 2107 as amended by Statutes 2001, chapter 703. However, Conrado has not demonstrated any judicial error involving this issue.

Conrado contends he met his burden to show entitlement to relief under section 2122, subdivision (f) by establishing noncompliance with the statutory disclosure requirements for exchange or waiver of final declarations of disclosure applicable to judgments entered after January 1, 2002. (§§ 2105 - 2107, as amended by Stats. 2001, ch. 703, §§ 4-6, 8.) More specifically, Conrado contends the former spouses did not exchange the preliminary and final disclosures required under sections 2103 through 2105.⁹ Conrado also contends the 2001 Stipulation's waiver provision regarding

⁸ From separation until the date of distribution of community assets or liabilities, section 2102, subdivision (a) subjects the parties to the fiduciary duty standards of section 721 with respect to making accurate and complete disclosure of all assets and liabilities (§ 2102, subd. (a)(1)) and with respect to operating and managing a community business (*id.*, subd. (a)(3)).

⁹ Section 2103 requires that each party serve on the other party a preliminary declaration of disclosure under section 2104 and a final declaration of disclosure under section 2105, unless service of the final declaration is waived under sections 2105 or 2110 [inapplicable here as involving waiver in cases of default judgments], and that each party file proof of service of each with the court.

Section 2104 sets forth the procedures bearing on service of a preliminary declaration of disclosure (subds. (a), (b)), its required contents (subd. (c)), and the required accompanying documents (subd. (e)).

exchange of final declarations of disclosure was not valid under the law in effect when the judgment was entered in February 2002.¹⁰ In particular, Conrado contends the waiver in the 2001 Stipulation did not include all mandatory representations required for a valid waiver under section 2105, subdivision (d).¹¹ Conrado also contends that

Section 2105 sets forth the procedures and time frames bearing on service of a final declaration of disclosure (subd. (a)), its required contents (subd. (b)), and the waiver of subdivision (a)'s final disclosure requirements (subd. (d)).

We note that in the 2001 Stipulation, Conrado asserted under penalty of perjury that the former spouses had exchanged preliminary declarations of disclosure and had waived final declarations of disclosure.

¹⁰ At the end of the 2001 Stipulation, the former spouses swore under penalty of perjury under California law that they had read the 2001 Stipulation and agreed to all its terms and conditions. The waiver included in the 2001 Stipulation provided:

"WAIVER OF FINAL DECLARATION OF DISCLOSURE FAMILY CODE § 2105

"a. each party has complied with Section 2104 and the preliminary declaration of disclosure of the status of the assets and debts has been exchanged and ratified by each party hereto;

"b. Wife and Husband have each served property declarations and income and expense declarations as provided in Section 2110;

"c. This waiver is knowingly, intelligently, and voluntarily entered into by each of the parties;

"d. Each party understands that by signing this waiver, he or she may be affecting his or her ability to have the judgment set aside as provided by law."

The 2001 Stipulation's waiver met the statutory requirements in effect at the time it was signed.

¹¹ Section 2105, subdivision (d) provides: "The parties may stipulate to a mutual waiver of the requirements of subdivision (a) concerning the final declaration of disclosure, by execution of a waiver under penalty of perjury entered into in open court or by *separate stipulation*. The waiver shall include all of the following representations:

"(1) Both parties have complied with Section 2104 and preliminary declarations of disclosure have been completed and exchanged.

"(2) Both parties have completed and exchanged a current income and expense declaration, that includes all material facts and information regarding that party's earnings, accumulations, and expenses.

contrary to the requirements of sections 2105 and 2106,¹² the waiver in the 2001 Stipulation was not set forth in a separate statement or made under penalty of perjury. Conrado thus concludes that because the judgment was entered without compliance with the statutory disclosure requirements of sections 2103 through 2106, set aside of the judgment was mandatory under section 2122, subdivision (f), and section 2107, subdivision (d).

"(3) Both parties have fully complied with Section 2102 and have fully augmented the preliminary declarations of foreclosure, including disclosure of all material facts and information regarding the characterization of all assets and liabilities, the valuation of all assets that are contended to be community property or in which it is contended the community has an interest, and the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability.

"(4) The waiver is knowingly, intelligently, and voluntarily entered into by each of the parties.

"(5) Each party understands that this waiver does not limit the legal disclosure obligations of the parties, but rather is a statement under penalty of perjury that those obligations have been fulfilled. Each party further understands that noncompliance with those obligations will result in the court setting aside the judgment." (*Italics added.*)

¹² At the time judgment was entered, section 2106 provided: "Except as provided in subdivision (d) of Section 2105 [waiver of final declaration of disclosure] or in Section 2110 [waiver in default judgment], absent good cause, no judgment shall be entered with respect to the parties' property rights without each party, or the attorney for that party in this matter, having executed and served a copy of the final declaration of disclosure and current income and expense declaration. Each party shall execute and file with the court a declaration signed under penalty of perjury stating that service of the final declaration of disclosure and current income and expense declaration was made on the other party or that service of the final declaration of disclosure has been waived pursuant to subdivision (d) of Section 2105 or in Section 2110."

Citing section 2106, Conrado contends the clerk lacked jurisdiction to enter judgment because the file did not contain proofs of service of the required disclosure documents. We do not reach this contention because it was not raised by Conrado in the trial court.

At the time judgment was entered, section 2107, subdivision (d) provided: "If a court enters a judgment when the parties have failed to comply with all disclosure requirements of this chapter, the court shall set aside the judgment. The failure to comply with the disclosure requirements does not constitute harmless error."¹³ Conrado asserts that absent demonstrated compliance with the statutory disclosure requirements, section 2107, subdivision (d) gives the court no discretion other than to set aside the judgment. Similarly, Conrado characterizes section 2122, subdivision (f)'s basis for set aside as leaving courts with little, if any, discretion.

Characterizing section 2107, subdivision (d) as mandating set aside of a judgment for failure to comply with the statutory disclosure requirements, Conrado contends the statute precluded the trial court from deeming the former spouses' noncompliance with the amended statutory disclosure requirements to be harmless error. Conrado concludes "there simply is no defense to failure to comply." Hence, according to Conrado, the trial court should have set aside the judgment and the underlying 2001 Stipulation because of the demonstrated noncompliance with the statutory disclosure requirements regardless of prejudice. (§ 2122, subd. (f).)

As posed by Conrado, the question becomes whether, in the absence of any resulting prejudice, the former spouses' failure to exchange the statutorily-required final declarations of disclosure was sufficient *by itself* to compel reversal of the denial of his

¹³ Conrado contends section 2107, subdivision (d) supersedes pre-2002 case law that affirmed judgments under a "harmless error" analysis despite violation of statutory disclosure requirements.

set-aside motion under the amended statutes applicable to judgments entered after January 1, 2002.

California Constitution, article VI, section 13 provides: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or *for any error as to any matter of procedure*, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Italics added.) For purposes of demonstrating entitlement to reversal of the order denying Conrado's set-aside motion, that constitutional provision required him to show that any noncompliance with the statutory disclosure requirements resulted in a miscarriage of justice. The constitutional provision prevails over the statutory language of section 2107, subdivision (d). (Cf. *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 595.) Hence, to the extent Conrado interprets section 2107, subdivision (d) to require that the judgment be set aside simply because of the former spouses' failure to exchange final declarations of disclosure or waive their exchange under the amended statute, his interpretation is inconsistent with the California Constitution.

Conrado's proffered interpretation of section 2107, subdivision (d) also conflicts directly with other provisions in the relevant statutory scheme. Specifically, section 2105, subdivision (c) provides: "In making an order setting aside a judgment for failure to comply with this section, the court may limit the set aside to those portions of the judgment *materially affected* by the nondisclosure." (Italics added.) Further, section

2121, subdivision (b) provides that in all proceedings under section 2120 et seq., "before granting relief, the court shall find that the facts alleged as the grounds for relief *materially affected* the original outcome and that the moving party would *materially benefit* from the granting of the relief." (Italics added; see *Brewer, supra*, 93 Cal.App.4th at p. 1345; *Rosevear, supra*, 65 Cal.App.4th at pp. 684-685; *Varner, supra*, 55 Cal.App.4th at p. 137.) Moreover, section 2125 provides in relevant part: "When ruling on an action or motion to set aside a judgment, the court shall set aside only those provisions *materially affected* by the circumstances leading to the court's decision to grant relief." (Italics added.)

Statutes must be construed, if possible, to render them constitutional. (*Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 466; *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594.) Similarly, statutory schemes must be read as a whole to harmonize their provisions. (*Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1320; *Board of Retirement v. Santa Barbara County Grand Jury* (1997) 58 Cal.App.4th 1185, 1189.) The portion of section 2107, subdivision (d) providing that noncompliance with final disclosure requirements is not "harmless error" must yield to the Constitution and the remainder of the Legislature's statutory scheme.

Conrado did not present credible admissible evidence sufficient to show the former spouses' failure to comply with statutory requirements to exchange final declarations of disclosure or sign a waiver under the amended statute materially affected the terms of the judgment. Accordingly, because Conrado has not demonstrated entitlement to relief under section 2122, subdivision (f), the trial court properly denied his

set-aside motion. (Cal. Const., art. VI, § 13; Fam. Code, §§ 2105, subd. (c), 2121, subd. (b), 2125.)¹⁴

In sum, on appeal Conrado has not shown reversible error.¹⁵

IV

DISPOSITION

The order is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

MCINTYRE, J.

¹⁴ Conrado requests that we judicially notice the "fact" that Teresita never filed a proof of service of a preliminary or a final declaration of disclosure in compliance with section 2100 et seq. We decline to do so because such fact is not necessary to resolution of this appeal.

Conrado also requests that we judicially notice the fact that the superior court file contains no document indicating Attorney Somerville ever substituted into this case as Teresita's counsel. We decline to do so because even if such fact were judicially noticed, it would not alter our disposition.

We grant Conrado's motion filed on November 3, 2003, to augment the record.

¹⁵ Because Conrado has not shown any mistake or prejudicial statutory noncompliance, we do not reach the argument of Teresita's executor Casillas that the family court could have denied set aside under section 2128, subdivision (c) on equitable principles.